No. 11,865

# In the United States Court of Appeals for the Ninth Circuit

TRANS-PACIFIC AIRLINES, LIMITED, APPELLANT

*vs.*

HAWAIIAN AIRLINES, LIMITED, APPELLEE

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII*

## BRIEF OF CIVIL AERONAUTICS BOARD AS AMICUS CURIAE


EDWARD DUMBAULD,
WILLIAM D. McFARLANE,
*Special Assistants to the Attorney General*
*Department of Justice, Washington, D. C.*
EMORY T. NUNNELEY, Jr.,
*General Counsel, Civil Aeronautics Board.*

HERBERT A. BERGSON,
*Assistant Attorney General.*
FRANK J. HENNESSY,
*United States Attorney.*
JOHN H. WANNER,
*Assistant General Counsel,*
*Civil Aeronautics Board.*
OLIVER CARTER,
*Acting Chief, Enforcement and Litigation Section,*
*Civil Aeronautics Board.*
ROBERT BURSTEIN,
GILBERT E. ANDREWS,
*Attorneys, Civil Aeronautics Board.*

# INDEX AND TABLE OF AUTHORITIES

## TABLE OF CONTENTS



## TABLE OF CASES





812243—48——1

## STATUTES AND MISCELLANEOUS

# In the United States Court of Appeals for the Ninth Circuit

No. 11,865

TRANS-PACIFIC AIRLINES, LIMITED, APPELLANT

*vs.*

HAWAIIAN AIRLINES, LIMITED, APPELLEE

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII*

## BRIEF OF CIVIL AERONAUTICS BOARD AS AMICUS CURIAE

### STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Territory of Hawaii permanently enjoining the appellant from engaging in air transportation in violation of Section 401 (a) of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. 481 (a)).[1]

This action was brought in the court below on September 3, 1947, pursuant to the provisions of Section 1007 (a) of the Act (49 U. S. C. 647 (a)). The complaint alleges, in substance, as follows. The ap-

[1] The pertinent provisions of the Act (52 Stat. 973, 49 U. S. C. 401 et seq.) are set forth *infra*, pp. 34–36.

pellant, Trans-Pacific Airlines, Limited, an air carrier as defined in the Act (Section 1 (2), 49 U. S. C. 401 (2)), has been engaged in air transportation within the meaning of the Act (Sections 1 (10) and (21), 49 U. S. C. 401 (10) and (21)) between points within the Territory of Hawaii without having a certificate of public convenience and necessity from the Civil Aeronautics Board [2] as required by Section 401 (a) of the Act, and has conducted such air transportation operations on a regularly scheduled basis. Such operations have been in violation of the Act and have caused damage to the appellee, Hawaiian Airlines, Limited, a holder of a certificate of public convenience and necessity authorizing it to engage in air transportation between points within the said Territory of Hawaii. The appellee prayed the court for an injunction, both preliminary and permanent, restraining the appellant from the alleged violation of Section 401 (a) of the Act (R. 2–4).

On September 11, 1947, the lower court filed a "Memorandum of Ruling upon Motion for Preliminary Injunction," holding that appellant's operations constituted a violation of Section 401 (a) of the Act and that, therefore, Section 1007 (a) conferred jurisdiction upon the court to enjoin such operations at the request of the appellee, a party in interest within the purview of that Section. A preliminary injunction was accordingly

[2] Reorganization Plan No. IV, 5 F. R. 2421–2423, which became effective on June 30, 1940, reassigned the duties and functions of the "Civil Aeronautics Authority" under the Act in terms of the "Civil Aeronautics Board" and the "Administrator of Civil Aeronautics."

issued by the court (R. 9–12, reported in 73 F. Supp. 68).

On or about September 30, 1947, the appellant filed an answer challenging the jurisdiction of the court under Section 1007 (a) of the Act. The answer admitted that appellant has engaged in air transportation without a certificate of public convenience and necessity but denied that such a certificate was required by Section 401 (a) of the Act. The answer also denied that appellant conducted a regularly scheduled air transportation service between points within the Territory of Hawaii in violation of the Act.[3]

On November 10, 1947, the court, after trial of the issues on final hearing, made its findings of fact and conclusions of law. The court found that from January 1, 1947, to September 11, 1947, the appellant engaged in air transportation as a common carrier between points within the Territory of Hawaii and has "conducted a regular scheduled daily service as a common carrier between points within the Territory of Hawaii" without having a certificate of public convenience and necessity from the Board. The court further found that the appellant has a letter of registration issued to it by the Board pursuant to Section 292.1 of the Board's Economic Regulations but that during the aforesaid period the appellant has not operated within the allowable limits of said Section 292.1 (R. 13). The court concluded that the appellant's operations were not conducted under any exemptions pursuant to Section 416 (b) of the Act (49 U. S. C. 496 (b)); that such operations, therefore, constituted a violation of Section 401 (a) of

[3] The answer has not been printed in the record.

the Act; and that, consequently the court had jurisdiction by virtue of Section 1007 (a) of the Act to grant the relief sought (R. 14–15). The writ of permanent injunction issued by the court enjoined the appellant from engaging in air transportation in violation of Section 401 (a) of the Act and from holding out to the public, expressly or by course of conduct, that it conducts air operations of greater regularity than that permitted by Section 292.1 of the Board's Economic Regulations. The writ provides that it will not prohibit operations of appellant in accordance with the exemption granted it by said Section 292.1 and that violations of the injunction shall be determined by the application of the standard of regularity currently adopted by the Board (R. 19–22).

This appeal is based solely on jurisdictional grounds. Appellant's contentions are as follows: (1) appellee as a party in interest is authorized by Section 1007 (a) of the Act to bring suit for injunctive relief only in case of a violation of Section 401 (a) of the Act. Appellant is the holder of a letter of registration as an irregular air carrier issued by the Board pursuant to Section 292.1 of the Board's Economic Regulations which exempts appellant from the requirements of Section 401 (a) of the Act with respect to irregular air transportation operations. Consequently, this is not an action to enjoin a violation of Section 401 (a) of the Act but to enforce a regulation of the Board. (2) The Board has primary jurisdiction to determine whether appellant's operations have been in excess of the exemption provided by Section 292.1 of the Economic Regulations.

The appellant does not challenge the court's findings that it conducted "a regular scheduled daily service".

## SUMMARY OF DISCUSSION

The Board's position may be briefly summarized as follows:

1. Section 401 (a) of the Act provides that no air carrier shall engage in air transportation without a certificate of public convenience and necessity. Section 416 (b) of the Act authorizes the Board to exempt air carriers from certain requirements of the Act, including the certificate requirement of Section 401 (a). Consequently, any air transportation operations engaged in without a certificate authorizing such air transportation are in violation of Section 401 (a) of the Act unless they have been exempted from said Section. By Section 292.1 of its Economic Regulations, the Board created such an exemption for "Irregular Air Carriers," defined as air carriers who do not hold out to the public that they operate aircraft between designated points regularly or with a reasonable degree of regularity and whose air transportation services are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operations between such designated points. Since the appellant has, in fact, held out and rendered regular service, otherwise than as contemplated by Section 292.1 of the Economic Regulations, appellant has automatically ceased to be within the exemption and is automatically guilty of a violation of Section 401 (a) of the Act. Consequently, the appellee, as a party in interest, is entitled to maintain this action.

812243—48——2

2. Section 1007 (a) of the Act was expressly designed to afford parties in interest, as well as the Board, a direct and independent judicial remedy against unauthorized air transportation in violation of Section 401 (a) of the Act. To hold that the Board has primary jurisdiction to determine the question of unauthorized air transportation and to require a prior proceeding on that question before the Board would not only be inconsistent with the language of Section 1007 (a) but would also nullify, to a large extent, the purpose of that Section. Aside from the clear language and intent of Section 1007 (a), the doctrine of primary jurisdiction would be inapplicable here since the problem here is not like one involving the reasonableness of a rate or the fairness of a practice requiring the special knowledge of an administrative tribunal. The kind of question involved here has been decided by courts in innumerable instances without requiring prior resort to the administrative tribunal. Assuming, *arguendo,* that the question whether appellant operated within the exemption provided by Section 292.1 of the Economic Regulations can in the first instance be said to require the exercise of administrative discretion, the Board has promulgated a standard for ascertaining the frequency and regularity of operations permitted under such exemption. In this case, certainly, no purpose would be served in requiring a further determination by the Board. Appellant operated a regular, scheduled daily service. Consequently, by any standard, its operations were outside the exemption of section 292.1.

DISCUSSION

## I. The complaint alleges facts establishing a violation of Section 401 (a) of the Act

### A. The nature and extent of the exemption provided by Section 292.1 of the Economic Regulations

The Act provides for only one form of economic authority for air carriers who engage in air transportation—the certificate of public convenience and necessity. Section 401 (a) of the Act provides that "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority (now the Board) authorizing such air carrier to engage in such transportation." In order to impart flexibility to the administration of the Act, Congress incorporated in the Act a provision, Section 416 (b) (1) (49 U. S. C. 496 (b) (1)) authorizing the Board, under certain circumstances, to grant exemptions from the detailed regulatory provisions of Title IV of the Act (49 U. S. C. A. 481 *et seq.*), including Section 401 (a). Section 416 (b) (1) provides as follows:

> The Authority, from time to time and to the extent necessary, may * * * exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

The primary purpose of Section 416 (b) of the Act was to provide relief for the irregular and sporadic operations of the so-called "fixed-base" operators and for the carriers engaging in unusual or limited operations. See *Standard Air Lines, Inc., Exemption Request,* Docket No. 3430 *et al.,* decided by the Board October 14, 1948. Consequently, on October 15, 1938, shortly after the passage of the Act, the Board promulgated Section 292.1 of its Economic Regulations exempting such carriers, then called "non-scheduled" air carriers, from the provisions of Title IV. At the time the "non-scheduled" exemption order was first adopted and until the end of the war, non-scheduled air transportation was of limited economic significance. However, the release from military duty of thousands of persons who had received aviation training in the armed services, together with the almost simultaneous availability of large transport type aircraft from war surplus, resulted in the formation of numerous companies purporting to engage in so-called "non-scheduled operations." Many of these companies were utilizing aircraft of the type employed by the certificated or "scheduled" air lines, and were in fact conducting regular and substantial air transportation services. See *Investigation of Nonscheduled Air Services,* 6 C. A. B. 1049 (1946). Accordingly, effective June 10, 1947, the presently effective Section 292.1 was adopted [4] for the purpose of narrowing the exemption and for the more effective regulation of

[4] This regulation is set forth in the Appendix to Appellant's Brief. The Board's Explanatory Statement and Findings with respect to this regulation are set forth in the Appendix to this Brief, *infra* (pp. 36–49).

those persons availing themselves of the exemption. This was done both for the protection of the public from improper practices and for the protection of the certificated carriers against unregulated competition.[5]

Paragraph (b) of Section 292.1 of the Economic Regulations defines an "Irregular Air Carrier," in part, to mean "any air carrier * * * which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity, upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers." By way of further definition, the regulation also provides as follows:

> No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points.

Although the definition in the regulation is necessarily set forth in general terms, the frequency and regularity of operations which are permitted under such definition are ascertainable as a result of a standard first applied in the consent order approved and entered by the Board in *Matter of the Non-Cer-*

[5] Paragraph 1 of the Board's findings on adoption of the presently effective Section 292.1, *infra* (p. 44–45).

*tificated Operations of Trans-Caribbean Air Cargo Lines,* Docket No. 2593, Orders Serial No. E-370, dated March 14, 1947.[6] By this order, the carrier was directed to cease and desist from operating flights of aircraft in air transportation:

> 3. (*a*) in such manner that any given or uniform number of flights are operated between the same two points per week or recurrently in successive weeks;
>
> (*b*) regularly or with a reasonable degree of regularity, which regularity is reflected by the operation of a single flight per week on the same day of each week between the same two points, or is reflected by the recurrence of operations of two round-trip flights, or flights varying from two to three or more such flights, between any same two points each week in succeeding weeks, without there intervening other weeks or approximately similar periods at irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service; it being intended by this subparagraph to require irregularity in service between any such points but not to preclude the operation of more than one or two such flights in any given week, nor to prescribe any specific maximum limitation upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in numbers of flights and intervals between flights and through

[6] The general nature of operations permissible under Section 292.1 was previously discussed by the Board in *Investigation of Non-Scheduled Air Services*, *supra*, *Trans-Marine Airlines, Inc.*, 6 C. A. B. 1071 (1946), and *Page Airways, Inc.*, 6 C. A. B. 1061 (1946).

> frequent and extended definite breaks in service * * *
>
> (*c*) otherwise than upon an occasional and infrequent basis restricted to such rarity and infrequency of flight as to preclude any uniform pattern or normal consistency of operation between such points * * *

This standard has been designated by the Board, in the Explanatory Statement accompanying the currently effective Section 292.1 (*infra,* p. 39) as a guide to operations permissible under the regulation and has been applied in a number of cases.[7] Although such standard does not establish a rigid pattern for operations and, consistent with the intent of a regulation permitting irregular operations, permits flexibility in the operation of a particular irregular service, it nevertheless establishes definite criteria whereby it can be determined whether the operations of a carrier are in fact being conducted within the limits of the exemption. Thus, flights between designated points, whether one or more per week, must be staggered as to the days of the week

---

[7] *Matter of the Non-Certificated Operations of Trans-Luxury Airlines, Inc.*, Docket No. 2589 (April 22, 1947); *Matter of the Non-Certificated Operations of Willis Air Service, Inc.*, Docket No. 2639 (April 22, 1947); *Matter of Non-Certificated Operations of Skyline, Inc.*, Docket No. 2635 (May 20, 1947); *Matter of the Non-Certificated Operations of Union Southern Airlines*, Docket No. 2637 (May 23, 1947); *Matter of the Suspension and Revocation of Letter of Registration No. 621 issued to Continental Charters, Inc.*, Docket No. 3288 (September 30, 1948); *Standard Air Lines, Inc., Exemption Request, Supra; Matter of Virgin Islands Air Service, Inc., et al.*, Docket No. 3422 (November 1, 1948). This standard has also been applied by the court in *Civil Aeronautics Board* v. *Winged Cargo, Inc.*, E. D. Pa., consent injunction entered December 16, 1947, as well as by the lower court in this case.

in successive weeks; if more than one such flight is to be operated per week in successive weeks such flights must not only be staggered as to days of the week, but there must also be breaks in continuity of service for a week or approximately that period during which no flights are operated; and the flights must be of such infrequency as to preclude any implication of a uniform pattern or normal consistency of operations. With respect to this latter requirement the *Trans-Caribbean* order indicates with clarity that two or more round-trip flights in recurring weeks without appreciable and definite breaks in service are in excess of those permitted under the Regulations.

**B. Since appellant's operations have been in excess of those authorized by Section 292.1 of the Economic Regulations, appellant is automatically outside of the exemption and in violation of Section 401 (a) of the Act**

The appellant has been issued no certificate of public convenience and necessity to engage in air transportation. It was only issued a letter of registration under Section 292.1 of the Economic Regulations whereby the Board has exempted from the operation of Section 401 (a) irregular air carriers as defined therein, that is, air carriers who do not operate regularly or with a reasonable degree of regularity between any two points. The Board has not exempted from the operation of Section 401 (a) any air carrier who does, in fact, operate regularly or with a reasonable degree of regularity between any two points. Consequently, since appellant has engaged in air transportation other than as an irregular air carrier within the meaning of Section 292.1, it was necessarily in violation of Section 401 (a), for the reason that

such operations have neither been authorized by a certificate of public convenience and necessity nor exempted from the requirement of having such a certificate.

This question has been thoroughly considered by District Judge Dimond in the cases of *Pacific Northern Airlines* v. *Northern Airlines* and *Pacific Northern Airlines* v. *Alaska Airlines,* District Court for the Territory of Alaska, Third Division, Nos. A–4769 and A–4768, respectively, decided December 12, 1947, and August 7, 1948. The *Northern Airlines* case cited involved the precise question here. A party in interest brought suit under Section 1007 (a) of the Act to enjoin a holder of a letter of registration under Section 292.1 from operating in air transportation in excess of the scope of Section 292.1. The court held that such operations constituted a violation of Section 401 (a) of the Act and could be enjoined upon application of a party in interest. The *Alaska Airlines* case involved Section 292.2 of the Board's Economic Regulations which exempted Alaskan Air Carriers from Section 401 (a) of the Act "insofar as the enforcement of said sections would prevent any such air carrier" from conducting charter trips and rendering other special services. In spite of the difference in language between Section 292.1 and Section 292.2, Judge Dimond saw no distinction between the two regulations as to the question of a violation of Section 401 (a) of the Act and held that operations beyond the scope of either regulations constituted a violation of such Section 401 (a). And there is, in fact, no such distinction. In the one case, the clear intention

812243—48——3

of the regulation is to exempt only charter and special services and in the other case the equally clear intention of the regulation is to exempt only irregular operations.

Section 292.1, being an exemption from Section 401 (a), is inextricably related to Section 401 (a). It is, in essence, an exception or a proviso to Section 401 (a). It is as if Section 401 (a) read that no air carrier shall engage in any air transportation without a certificate, provided that no certificate shall be required with respect to irregular operations. The appellant was charged with the offense of violating Section 401 (a). To be relieved from such charge, appellant had the burden of proving that he was within the proviso or the exception, that is, that his operations were irregular. Since he was unable to prove that, he was necessarily operating in violation of Section 401 (a). As aptly stated by Judge Dimond in the *Alaska Airlines* case:

> Section 401 (a) forbids all common carriage by air—regular and irregular, scheduled and nonscheduled—without a certificate. Section 416 (b) (2) gives the Board authority to exempt carriers from that requirement of 401 (a). A carrier so exempted is safe within the area of the exemption so long as he remains within the external boundary limits of his exemption, as within the walls of a protecting fortress; but without those walls, 401 (a) still rules and its mandate must be obeyed. Hence one departing from the exempted area of operation necessarily comes within the original jurisdiction of 401 (a) which says that all common carrier

> operations must be certificated. Common carrier operations without such certificate may be enjoined by a party in interest under 1007 (a). As a defense to the charge brought under 401 (a) for operating as a common carrier without a certificate, the defendant admits common carriage without certificate but says that it is exempt from 401 (a), and pleads and proves the order of exemption, the conditions thereof, and defends its operations thereunder. If defendant has been so exempted and has not transgressed the conditions of its exemption, there is no violation of 401 (a), but if defendant has not acted and is not acting within the exemption, it must necessarily be operating in violation of 401 (a). That it is also operating in violation of the exemption order is merely conclusive proof of violation of 401 (a). Actions beyond the scope of the exemption differ in no way from operations without any exemption at all.

The situation here is, in essence, no different from the situation under the Motor Carrier Act (Part II of the Interstate Commerce Act, 49 U. S. C. 301 et seq.) which authorizes the Interstate Commerce Commission to grant a certificate for special or charter operations over other than regular routes and between fixed termini (Section 207 (a), 49 U. S. C. 307 (a)) and which provides certain exceptions from the prohibition against operating without a certificate (Sections 206 (a) and 203 (b), 49 U. S. C. 306 (a) and 303 (b)). A person operating in excess of his authority as an irregular carrier under Section 207 (a) of that Act is in violation of Section 206 (a) which pro-

hibits motor carrier operations without a certificate of public convenience and necessity. *Interstate Commerce Commission* v. *Fordham Bus. Corp.,* 38 F. Supp. 739 (S. D. N. Y., 1941). Similarly, a carrier who has not sustained the burden of proving that his operations are within any of the exceptions is guilty of the offense of carrying without a certificate. *United States* v. *Union Pacific R. Co.,* 20 F. Supp. 665 (S. D. Idaho, 1937); *United States* v. *Chadwick,* 39 F. Supp. 204 (E. D. Pa., 1940); *United States* v. *Mertine,* 64 F. Supp. 792 (D. N. J., 1946); *United States* v. *Krinvic Bros.,* 47 F. Supp. 48 (E. D. Pa., 1942). See also *Spokane & Inland Empire R. R. Co.* v. *United States,* 241 U. S. 344 (1916).

Recently, on October 5, 1948, in the case of *American Airlines, Inc.,* v. *Standard Air Lines, Inc.,* United States District Court for the Southern District of New York, Civil No. 47–272, Judge Kaufman denied plaintiff's motion for a preliminary injunction to restrain the defendant from violations of the Act similar to those alleged here. Judge Kaufman was apparently of the view that until defendant's letter of registration under Section 292.1 of the Economic Regulations is either suspended or revoked by the Board,[8] the de-

[8] Paragraphs (d) (4) and (5) of Section 292.1 of the Economic Regulations provide as follows:

"(4) *Suspension of Letter of Registration.*—Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest.

"(5) *Revocation of Letter of Registration.*—Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as amended, or of any order, rule, or regulation issued under any such provision, or of any term, condition, or limitation of any authority issued under said Act or regulations."

fendant, regardless of the scope of his activities, is totally exempt from the provisions of Section 401 (a) of the Act and cannot violate such Section. We believe the motion in that case to have been wrongly disposed of. The letter of registration does not at all mean that its holder is, in fact, within the exemption of 292.1. As shown by appellant's letter of registration (R. 80) the letter is merely an acknowledgement that the carrier has registered with the Board and expressly states that "it is not a certificate of public convenience and necessity," but "merely evidence of registration." Whether or not the holder of such letter is, in fact, an irregular air carrier as defined in Section 292.1 depends entirely on the scope of his operations. Section 292.1 does not exempt a carrier from Section 401 (a) of the Act so long as he holds a letter of registration. Section 292.1 exempts a carrier so long as he holds a letter *provided* he is, in fact, an irregular air carrier. A carrier with an outstanding letter of registration whose operations are not irregular is just as much outside the exemption as a carrier whose letter has been suspended or revoked. It is just as illogical to contend that an irregular air carrier, regardless of the extent of his operations, continues to be within the protection of the exemption so long as his letter of registration is outstanding as it is to say that a certificated carrier operating beyond the scope of his certificate cannot be in violation of the law until the certificate has been suspended or revoked. See *United States* v. *Chadwick,* 39 F. Supp. 204, 206; *Interstate Commerce Commission* v. *Fordham Bus Corp., supra; Interstate*

*Commerce Commission* v. *Moland Bros. Trucking Co.*, 62 F. Supp, 921 (D. Minn., 1945); *Consolidated Freightways, Inc.* v. *United States,* 136 F. (2d) 921 (C. C. A. 8, 1943).

**II. The lower Court has original jurisdiction to determine whether appellant's operations have been outside the scope of the exemption provided by Section 292.1**

**A. Section 1007 (a) of the Act was clearly designed to confer original jurisdiction upon the Court to enjoin any violations of Section 401 (a) upon application of a party in interest**

Section 1007 (a) of the Act provides as follows:

> If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Authority, its duly authorized agent, or in the case of a violation of section 401 (a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and enjoining upon them obedience thereto."

This Section accomplishes two things. It invests the Board with full power and authority to bring such an

action as this directly with respect to any violation of the Act or any requirement thereunder. See *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 342–343 (1897); *Interstate Commerce Commission* v. *Fordham Corp., supra.* And it invests a "party in interest" with the same power and authority in "the case of a violation of section 401 (a)." It seems clear that by this provision Congress intended to afford air lines injured by unauthorized competition a speedier and more effective remedy than is provided in Section 1002 (a) of the Act (49 U. S. C. A. 642 (a)), which entitles any person to file with the Board a complaint with respect to anything done in contravention of any provisions of the Act. To apply the doctrine of primary jurisdiction in a Section 401 (a) case, that is, to require prior resort to the Board, would clearly be inconsistent with such intention.

The applicability of the doctrine of primary administrative jurisdiction to facts such as those involved here has been rejected in *Pacific Northern Airlines* v. *Northern Airlines* and *Pacific Northern Airlines* v. *Alaska Airlines,* both *supra.* In the *Northern Airlines* case, the court held that it had original jurisdiction to determine whether the operations of the defendant were within the scope of Section 292.1 of the Economic Regulations. The same result was reached in the *Alaska Airlines* case, which involved the question of the court's initial jurisdiction to determine whether the defendant's operations exceeded the exemption provided by Section 292.2 of the Economic Regulations, that is, whether defendant's operations were "casual, occasional, or infrequent," and were "not

made in such manner as to result in establishing a regular or scheduled service." In that case, the Court said:

> Full consideration has been given to the arguments of counsel for the defendant on the doctrine of primary jurisdiction illustrated in *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company,* 204 U. S. 426 (1907), which would deny to the Court the authority to grant any relief to the plaintiff and intervenors in this action. But the language used in the Act appears to commend the contrary result. The circumstantial detail with which the Act was written requires the conclusion that if Congress had desired the Courts not to intervene in circumstances such as have been presented in this case, appropriate language would have been used to that end. The Act which controls here was enacted by a Congress which must have had ample knowledge of the doctrine mentioned. Evidently the same conclusion was arrived at in the Hawaiian Airlines case hereinbefore cited. That view is not shaken by the decisions given in *Adler* v. *Chicago & Southern Air Lines, Inc.,* D. C. Mo. 1941, 41 F. Supp. 366, and other similar cases, which rightly uphold the primary jurisdiction doctrine on the facts there disclosed.

See also *Flying Tiger Line, Inc., et al.* v. *Atchison, Topeka and Santa Fe Ry. Co.,* 75 F. Supp. 188 (S. D. Cal., 1947).

The decisions in these cases are indubitably correct. Section 1007 (a) applies to any violations of Section 401 (a). It makes no distinction between violations resulting from operating without any authority at all

or violations resulting from operating in excess of authority. Congress authorized the drastic remedy of the injunction in Section 401 (a) cases in order to protect air lines against injuries from unauthorized competition. If air lines could not invoke this remedy to prevent excessive operations by irregular air carriers, they would lose the protection afforded by such remedy where it is most needed.

There has never been any doubt under similar provisions authorizing direct court actions that the courts have jurisdiction to decide many questions of at least equal complexity with the question involved here and questions which would otherwise be decided by the agency dealing with the general subject matter. For example, Section 1 (20) of the Interstate Commerce Act (49 U. S. C. 1 (20)), provides that any construction of a railroad extension without a certificate of public convenience and necessity from the Interstate Commerce Commission "may be enjoined by any court of competent jurisdiction at the suit of * * * any party in interest." Under that provision, which apparently served as a pattern for Section 1007 (a), *Flying Tiger Line, Inc., et al.* v. *Atchison, Topeka and Santa Fe Ry. Co., supra,* at p. 192, the courts have assumed jurisdiction to decide such technical issues as whether the particular track was an industrial spur rather than an extension of a railroad or whether the extension was a railroad engaged in intra-state operations only, without waiting for those questions to be presented to and determined by the Commission. *Texas & Pacific Railway Co.* v. *Gulf, Colorado &*

*Santa Fe Railway Co.,* 270 U. S. 266 (1926); *Smyth* v. *Asphalt Belt Ry., Co.,* 267 U. S. 326 (1925). Another example is Section 222 (b) of the Motor Carrier Act (49 U. S. C. 322 (b)) which confers jurisdiction upon the district courts on application of the Commission to enjoin any motor carrier from operating "in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder." Under that provision, too, the courts have consistently resolved complicated issues of fact and law in order to determine what are irregular operations, what operations fall within the various exceptions, and whether particular carriers are private, contract, or common carriers without waiting for a prior determination of such questions by the Commission itself. E. g., *Interstate Commerce Commission* v. *Fordham Bus Corp., supra; Georgia Truck System, Inc.,* v. *I. C. C.,* 123 F. (2d) 210 (C. C. A. 5, 1941); *I. C. C.* v. *Tank Car Oil Corp.,* 60 F. Supp. 133 (N. D. Ga., 1945), aff'd 151 F. (2d) 834 (C. C. A. 5, 1945); *A. W. Stickle & Co.* v. *I. C. C.,* 128 F. (2d) 155 (C. C. A. 10, 1942), cert. den. 317 U. S. 650 (1942); *I. C. C.* v. *Dunn,* 166 F. (2d) 116 (C. C. A. 5, 1948). Even under Section 222 (a) of the Motor Carrier Act (49 U. S. C. 322) which provides a criminal penalty for violations of that Act, courts have consistently decided, as an original matter, such questions as what constitute "terminal operations" and what operations fall within the exceptions for agricultural commodities or bona fide taxicab

service. See, e. g., *United States* v. *Motor Freight Express,* 60 F. Supp. 288 (D. N. J., 1945);[9] *United States* v. *Chadwick,* 39 F. Supp. 204 (E. D. Pa., 1940); *United States* v. *Krinvic Bros.,* 47 F. Supp. 481 (E. D. Pa., 1942); *United States* v. *Mertine,* 64 F. Supp. 792 (D. N. J., 1946). See, also, *McDonald* v. *Thompson,* 305 U. S. 263 (1938).

In view of the foregoing, we believe that it is clear from the language and purpose of Section 1007 (a) that the lower court had original jurisdiction to determine whether the appellant's operations have ex-

[9] In this case a criminal information was filed alleging that the defendant had operated beyond the authority of its certificate of public convenience and necessity. The defendant contended that the alleged unauthorized operations were in effect "terminal operations" which did not require any specific authority and that the Commission had made no specific finding as to the scope of the defendant's particular terminal area. The court found the defendant guilty and stated as follows (at p. 296):

"Finally, it is urged that the meaning of the statute and administrative regulations thereunder upon which the information is based are at present so lacking in that measure of reasonable certainty and clarity that a conviction of the defendant on the facts involved herein would be a denial of due process of law under the Fifth Amendment of the Constitution of the United States. * * *

"We feel that the boundary line beyond which it was illegal for defendant to operate had reasonably clear definition. The defendant operated outside of it at its peril. When agitated by the prospect of prosecution it sought, through the conventional course, to have the Interstate Commerce Commission make a determination consonant with its idea of its proper area of operation. It should have done so before it performed the transactions alleged in the information. That it did so afterward and the general trivial nature of defendant's acts of which complaint are made, when compared with its scope of operation, cannot be held to exculpate defendant of guilt, but go rather to the mitigation of the penalty which defendant has incurred."

ceeded those authorized by Section 292.1 of the Economic Regulations. In *American Airlines, Inc.* v. *Standard Air Lines, Inc., supra,* Judge Kaufman came to a contrary conclusion apparently for the reasons that the provisions of Section 292.1 for the suspension and revocation of letters of registration provide an exclusive remedy for alleged excessive operations by the holder of such letter and that since the Board alone can create and terminate defendant's exemption from Section 401 (a), only the Board can determine and prohibit operations in excess of such exemption. It is true that the Board has exclusive jurisdiction to suspend and revoke a letter of registration as well as to grant one. But that fact is immaterial to the question whether the court has original jurisdiction to determine and prohibit operations in excess of the exemption. The suspension and revocation provisions were designed to terminate the authority of the irregular air carrier to engage in *any* air transportation for reasons of public interest or for knowing and wilful violation of any provision of the Act or any requirements thereunder. They were not designed simply to compel an irregular air carrier to stay within the scope of his exemption. The remedies designed to accomplish that result are the cease and desist order by the Board and an injunction by a district court, or both. Section 401 (h) of the Act (49 U. S. C. 481 (h)) similarly confers exclusive jurisdiction upon the Board to suspend a certificate if the public interest so requires and to revoke such certificate for intentional failure to comply with any provision of the Act or any re-

quirements thereunder. Certainly, it cannot be contended that just because the Board alone has jurisdiction to grant and suspend or revoke a certificate, the Board alone has jurisdiction to determine whether a certificated carrier operates beyond the scope of its authority. Such a result would be preposterous and would in large part nullify the provision of Section 1007 (a) with respect to Section 401 (a) cases.[10]

The function of a court upon application for an injunction under Section 1007 (a) of the Act to restrain unauthorized operations is quite different from that exercised by the Board when it grants or suspends or revokes a certificate of public convenience and necessity or a letter of registration. The latter situation requires the exercise of administrative discretion and is therefore within the exclusive jurisdiction of the Board. The function of the court in a

---

[10] See *United States* v. *Chadwick*, *supra*, where the Court said at p. 206:

"As to the defendant's second contention—that possession of a certificate of convenience in one part of the United States gives him complete immunity on the criminal side in operating without a certificate elsewhere in the United States:

"To so hold would make a mockery of the Motor Carrier Act. A reading of the Act nowhere discloses any intention on the part of Congress to grant such immunity from criminal prosecution to the holders of certificates of public convenience. Defendant in effect would have the courts construe possession of even the most limited certificate of convenience anywhere in the United States as an immunity warrant for violation of the Motor Carrier Act elsewhere over the length and breadth of the United States—since, under the defendant's theory, the holder of a certificate, no matter how limited the area covered, could violate this Act in every section of the country and still remain free from criminal prosecution."

suit under 1007 (a) by a proper party is merely to determine whether the defendant has in fact engaged in unauthorized operations, and if so, to grant appropriate relief. As stated in *Texas and Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co., supra* (at p. 273):

> The function of the Court upon an application for an injunction under paragraph 20 is a very different one from that exercised by the Commission when, having taken jurisdiction under paragraphs 19 and 20, it grants or refuses a certificate. The function confided in the Commission is comparable to that involved in a determination of the propriety or application of a rate, rule or practice. It is the exercise of administrative judgment. Where the matter is of that character, no justiciable question arises ordinarily until the Commission has acted. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285, 295. The function of the Court upon the application for an injunction is to construe a statutory provision and apply the provision as construed to the facts. The prohibition of paragraph 18 is absolute. If the proposed track is an extension and no certificate has been obtained, the party in interest opposing construction is entitled as of right to an injunction.

**B. Aside from the clear language and intent of Section 1007 (a), the doctrine of primary jurisdiction is not applicable to the question whether appellant's operations have been in excess of those permitted by Section 292.1 of the Economic Regulations**

Under the doctrine of primary jurisdiction the courts will not determine a question within the juris-

diction of an administrative tribunal prior to the decision of the tribunal where the question demands the exercise of administrative discretion requiring the special knowledge and experience of the administrative tribunal. *Doctrine of Primary Administrative Jurisdiction,* 42 Am. Jur. pp. 698–702. Specifically, the doctrine of primary jurisdiction applies to such questions as the reasonableness of a rate or the fairness of a rule or a practice. See, e. g., *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426 (1907); *Mitchell Coal Co.* v. *Penn. R. R. Co.,* 230 U. S. 247 (1913); *United States Navigation Co.* v. *Cunard Steamship Co.,* 283 U. S. 474 (1932); *Adler* v. *Chicago and Southern Air Lines, Inc.,* 41 F. Supp. 366 (E. D. Mo., 1941).

The doctrine is not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule but a violation of such rate or rule. *Penna. R. R.* v. *Puritan Coal Co.,* 237 U. S. 121 (1915); *Penna. R. R. Co.* v. *Stineman Coal Mining Co.,* 242 U. S. 298, 300 (1915); *Barrett* v. *Gimbel Bros.,* 226 Fed. 623, 631 (C. C. A. 3, 1915); *Murray Co. et al.* v. *Gulf Coast and Santa Fe Ry. Co. et al.,* 59 F. Supp. 366 (N. D. Tex., 1945). Innumerable cases hold that courts have original jurisdiction to interpret tariffs, rules, and practices where the issue is one of violation rather than reasonableness. *W. P. Brown & Sons Lumber Co. et al.* v. *Louisville & Nashville Ry. Co. et al.,* 299 U. S. 393 (1937); *Burrus Mill and Elevator Co.* v. *Chicago, R. I. & P. Ry. Co.,* 131 F. (2d) 532 (C. C. A. 10, 1942); *Penna. R. R.* v. *Puritan Coal Mining Co.,* 237 U. S. 121, 134 (1915); *Penn-*

*sylvania Railway Co.* v. *Clark Bros. Coal Mining Co.,* 238 U. S. 456 (1915); *Louisville and Nashville R. R. Co.* v. *Cook Brewing Co.,* 223 U. S. 70 (1911); *Great Northern Railway Co.* v. *Merchants Elevator Company,* 259 U. S. 285 (1922); *United States* v. *Metropolitan Lumber Co.,* 254 Fed. 335 (D. N. J., 1918). When the administrative tribunal has "promulgated a rate which must be applied and where the only question is whether the commodity referred to in the rate is the commodity in question, then there is presented a factual question in nowise differing from any other fact issue determinable by courts and juries. Courts have original jurisdiction to try such issues." *Murray Co. et al.* v. *Gulf Coast and Santa Fe Ry. Co. et al., supra.* As stated in *United States* v. *Metropolitan Lumber Co., supra* (at p. 347):

> It is further urged that the defendants cannot be prosecuted in the absence of proceedings before a previous action by the Interstate Commerce Commission. This proposition seems to be based on two theories. It is first claimed that the embargo should have been submitted to the Interstate Commerce Commission, and its reasonableness ascertained and adjudicated by that body. The obvious answer is that the reasonableness of the embargo is not in issue in these cases; but the question is whether they have knowingly received a discrimination or concession in transportation service which a strict and impartial enforcement of the embargo would not have permitted them to receive. If the railroad company were being prosecuted for having given, or the defendants for having received, discriminations by means of or

> through the embargo rather than by violating it, in all probability the defendant's contention would be well taken, for in such a case the question would be whether the embargo was reasonable, or whether it produced unjust and unreasonable discrimination among shippers. In that event an administrative question would probably be presented, which, under the decisions of the Supreme Court, must be passed on by the Interstate Commerce Commission prior to the institution of either criminal or civil proceedings.[11]

Under the circumstances, we fail to see how the doctrine of primary jurisdiction could be applicable here. The question whether a carrier has violated Section 401 (a) has very little resemblance to the question of the reasonableness of a rate or practice and it may be for that reason that Congress conferred power to bring a direct court action in a 401 (a) case not only upon the Board but also upon any party in interest. Section 401 (a) contains an absolute prohibition against unauthorized air transportation. There is no question of reasonableness or administrative discretion involved in a suit to enjoin a violation of such Section. The Court merely has to decide whether air transportation operations have been conducted without any authority at all or in

---

[11] See, also, *Danciger* v. *Wells, Fargo & Co.*, 154 Fed. 379 (W. D. Mo., 1907), and *Royal Brewing Co.* v. *M. K. T. Ry.*, 217 Fed. 146 (D. Kan., 1914), where it was held that the question whether a carrier is required to receive and transport a certain commodity tendered to it for shipment is within the jurisdiction of the courts and need not first be determined by the Interstate Commerce Commission.

excess of authority.[12] It may be admitted that the question whether defendant's operations have exceeded in frequency and regularity those permitted by Section 292.1 is more difficult than the question whether a carrier had any authority at all. But that does not mean that primary jurisdiction to decide such question is with the Board. As has already been demonstrated, the courts have in many cases decided questions at least as difficult without first waiting for such questions to be determined by the administrative tribunal involved. See, *supra,* pp. 21–23.

Finally, even assuming that the question of the limits of permissible operations under Section 292.1 would otherwise present a proper case for application of the primary jurisdiction rule, such rule should not be invoked here. It is established that where the administrative tribunal, in the exercise of its discretion, had already passed upon a given issue or determined the meaning of a tariff or rule in one proceeding, courts may proceed to decide the same question in subsequent proceedings without further recourse to that tribunal. *Crancer et al.* v. *Lowden et al.,* 315 U. S. 631 (1942); *Penna. R. R. Co.* v. *Stineman Coal Mining Co., supra;*

---

[12] Compare *Penna. R. R.* v. *Puritan Coal Co., supra,* where the Court said (at pp. 131–132):

"But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage."

*Murray Co. et al.* v. *Gulf Coast and Santa Fe Railway Co. et al., supra; National Pole Co.* v. *Chicago and Northwestern Ry. Co.,* 211 Fed. 65 (C. C. A. 7, 1914); *Great Northern Ry. Co.* v. *Armour & Co.,* 26 F. Supp. 964 (N. D. Ill. 1939). As already shown, *supra,* pp. 9–12, the Board has evolved a standard for determining the extent of operations permitted under Section 292.1. Therefore, no purpose would be served in requiring any further determination by the Board. If the question calls for the exercise of administrative discretion, that discretion has already been exercised.[13]

[13] In *American Airlines, Inc.*, v. *Standard Airlines, Inc., supra*, Judge Kaufman expressed the fear that "serious chaos and conflict with the Board" might result if the courts were to decide this question. We believe that Judge Kaufman's fear is unfounded. In most cases, certainly, consistency with Board determinations may be achieved by the application of the standard promulgated by the Board. It is true that in a marginal case there is a possibility of a conflict in decision. But that possibility exists in any situation of concurrent jurisdiction or concurrent remedies. The same contention was made in *Great Northern Railway* v. *Merchants Elevator Co., supra.* Justice Brandeis rejected the argument as "unsound." He said at (p. 290):

"This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of federal law. If the parties properly preserve their rights, a construction given by any Court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari, and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission."

It would certainly be futile to require a further determination by the court in this case. The appellant operated a regular scheduled daily service; consequently, by any standard, its operations were outside the exemption of Section 292.1.[14]

---

[14] In the introductory statement in its brief (pp. 6–7) appellant urges, "in further fortification of the primary jurisdiction of the Board," that appellee, subsequent to the filing of the complaint herein, had intervened in the proceeding before the Board on appellant's application for a certificate of public convenience and necessity and had alleged in its petition for intervention that appellant was operating a regularly scheduled air carrier service between points within the Territory of Hawaii in violation of the Act (R. 81–83). It is clear that the nature and purpose of appellee's intervention in the proceeding before the Board are entirely different from the nature and purpose of the action here. Appellee intervened to oppose appellant's application for a certificate and not to seek relief from the Board against appellant's unauthorized operations. Even if the nature or purpose of the two proceedings were similar, it would not affect the jurisdiction of the lower court in this case. Section 1007 (a) provides a remedy which is independent of, and in addition to, any administrative remedy available to plaintiff. There is nothing in the Act to prevent plaintiff from pursuing both remedies simultaneously. As stated in the *Flying Tiger* case, *supra* (at p. 195), "Any person can file a complaint with the Board, or any person who is a party in interest may, if he desires, file an action in court under the limitations of section 647 (a) of Title 49 (section 1007 (a) of the Act). In fact, I see nothing in the Act which would prevent the taking of both procedures at the same time if a person thought it necessary." If Congress had intended that the two remedies should be alternative rather than cumulative, it would have said so expressly. See, e. g., Section 306 of the Packers and Stockyards Act, 7 U. S. C. 209; Section 9 of the Interstate Commerce Act, 49 U. S. C. 9; Section 308 (c) of the Interstate Commerce Act, 49 U. S. C. 908 (c).

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and order of the District Court are in all respects proper and should be affirmed.

EDWARD DUMBAULD,
WILLIAM D. MCFARLANE,
*Special Assistants to the Attorney General,*
*Department of Justice, Washington, D. C.*
EMORY T. NUNNELEY, JR.,
*General Counsel, Civil Aeronautics Board.*
HERBERT A. BERGSON,
*Assistant Attorney General.*
FRANK J. HENNESSY,
*United States Attorney.*
JOHN H. WANNER,
*Assistant General Counsel,*
*Civil Aeronautics Board.*
OLIVER CARTER,
*Acting Chief, Enforcement and Litigation Section,*
*Civil Aeronautics Board.*
ROBERT BURSTEIN,
GILBERT E. ANDREWS,
*Attorneys, Civil Aeronautics Board.*

# APPENDIX

## Statute and Regulation Involved

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 973, 49 U. S. C. 401 *et seq.*) are as follows:*

Section 1. As used in this Act, unless the context otherwise requires—

> (2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: * * *
>
> (10) "Air transportation" means interstate, overseas or foreign air transportation * * *
>
> (21) "Interstate air transportation" * * * mean(s) the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce * * * (a) * * * between places in the same territory * * * of the United States * * * whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation. (52 Stat. 973, 49 U. S. C. 401).

Section 401 (a). No air carrier shall engage in any air transportation unless there is in force a certificate

---

*The functions of the Authority in connection with, *inter alia*, economic regulations of air transportation were transferred to the Civil Aeronautics Board by Reorganization Plan No. IV. (See, *supra*, note 2, p. 2.) Accordingly, the term "Board" should be substituted for "Authority" in all statutory references thereto.

issued by the Board authorizing such air carrier to engage in such transportation * * * (52 Stat. 987, 49 U. S. C. 481 (a)).

Section 416 (b) (1). The Board, from time to time and to the extent necessary, may * * * exempt from the requirement of this title (IV) or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier, or class of air carriers, if it finds that the enforcement of this title or such provisions, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest. (52 Stat. 1005, 49 U. S. C. 496 (b)).

Section 1007. (a) If any person violates any provision of this Act, or any rule, regulation, requirement or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Authority, its duly authorized agent, or, in the case of a violation of section 401 (a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and

enjoining upon them obedience thereto. (52 Stat. 1025, 49 U. S. C. 467 (a)).

Section 292.1 of the Board's Economic Regulations, effective June 10, 1947 (12 Fed. Reg. 3076–3079) is set forth in the Appendix to the Appellant's brief at pages i to x. The "Explanatory Statement on Revision of Section 292.1 of the Economic Regulations" and the findings which accompanied said Section 292.1 of the Economic Regulations at the time of its adoption are as follows:

EXPLANATORY STATEMENT

> Attached is the Revision of Section 292.1 of the Board's Economic Regulations governing Non-Certificated Irregular Air Carriers, to become effective June 10, 1947. In order to facilitate a general understanding of the attached Regulation, and for that limited purpose only, the following statement is offered:
>
> Title IV of the Civil Aeronautics Act contains provisions pertaining to the economic regulation of air carriers.[1] Section 401 of this Title provides that no air carrier may engage in air transportation[2] unless there is in effect a certificate of public convenience and necessity issued by the Board authorizing it so to engage. Other sections of this Title

[1] "Air Carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation.

[2] "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft. "Interstate air transportation," "overseas air transportation," and "foreign air transportation," respectively, mean the carriage by aircraft of persons or property *as a common carrier for compensation or hire* or the carriage of mail by aircraft, in commerce between, respectively—

(*a*) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States.

provide certain additional requirements for air carriers, such as, for example, the filing of tariffs setting out rates and charges (Sec. 403) and the filing of reports (Sec. 407).

Section 416, however, permits the Board under certain circumstances to exempt from most of the requirements of Title IV certain air carriers or groups of air carriers. Under this prerogative the Board has in the past, in Section 292.1 of its Economic Regulations, exempted those air carriers engaged solely in nonscheduled operations from the requirement of a certificate of public convenience and necessity and from practically all other provisions of Title IV. Generally, those same nonscheduled air carriers would be classed, under the attached Regulation, as Irregular Air Carriers and would continue to be exempt from the requirement of

---

or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States; and a place in any other Territory or possession of the United States; and

(*c*) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

It will be noted from the foregoing definition that one of the attributes of an air carrier is that it be a common carrier. A test of common carriage frequently applied is whether the carrier holds itself out to the public as engaged in the business of carrying persons or property and that it will, so long as it has room, carry persons or property coming or brought to it for that purpose. Common carriage would not ordinarily include flight instruction, personal pleasure flying, flying in connection with one's own business, etc. A further description of the term is contained in the explanatory statement attached to Part 42 of the Civil Air Regulations.

a certificate of public convenience and necessity while being made subject to many other requirements from which they were previously exempted.

As will be seen from paragraphs (a) and (b) of the attached Regulation, Irregular Air Carriers include only those carriers which (1) do not hold a certificate of public convenience and necessity;[3] (2) do not operate within Alaska;[4] (3) are not Alaskan Air Carriers;[5] (4) are not operating pursuant to some other Board exemption.[6]

These carriers may not, after September 10, 1947, carry persons in foreign air transportation, and may not conduct service between any points with regularity or a reasonable degree of regularity. As to whether any particular operation might be deemed to be irregular within the meaning of this Regulation, reference is made to the Board's discussions of the matter in its decisions in the *Page* and *Trans-Marine*

---

[3] The issuance of an air carrier operating certificate pursuant to Part 42 of the Civil Air Regulations (pertaining to "safety" requirements) does not constitute an air carrier a "certificated air carrier," nor does any other kind of certificate except a certificate of public convenience and necessity as provided for in section 401 of the Act.

[4] This does not preclude operations by Irregular Air Carriers as between one or more points in Alaska, on the one hand, and a point or points in other United States territories or possessions or in the continental United States on the other.

[5] Covered by Section 292.2 of the Economic Regulations.

[6] The Board is simultaneously issuing Section 292.5 of the Economic Regulations establishing a class of air carriers, known as Noncertificated Cargo Carriers, open only to certain active air cargo carriers, which had on file with the Board prior to May 5, 1947, applications for certificates of public convenience and necessity to carry cargo only. A carrier operating as a Noncertificated Cargo Carrier under Section 292.5 could not also operate as an Irregular Air Carrier under Section 292.1.

cases, Dockets 1896 and 1967, respectively, and its *Investigation of Nonscheduled Air Services,* Docket 1501. In addition, an order consented to by the carrier was approved and entered by the Board in *Matter of the Noncertificated Operations of Trans-Caribbean Air Cargo Lines, Inc.,* Docket 2593, from which further guidance as to the extent of permissible operations may be obtained.[7]

The word "point" is defined as an airport and all territory in a 25-mile radius. Thus, for example, service to or from LaGuardia Airport, Newark Airport, Floyd Bennett Field, Roosevelt Field, or Teterboro Airport, on the one hand, and Washington National Airport, on the other, would be considered as one service and a pattern of regularity of operations would not be affected by alternating use of the airports in

[7] Paragraph 3 of this consent order provides that the carrier cease and desist from operating flights in air transportation between any points "* * * (b) regularly or with a reasonable degree of regularity, which regularity is reflected by the operation of a single flight per week on the same day of each week between the same two points, or is reflected by the recurrence of operations of two round trip flights, or flights varying from two to three or more such flights, between any same two points each week in succeeding weeks, without there intervening other weeks or approximately similar periods at irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service: it being intended by this subparagraph to require irregularity in service between any such points but not to preclude the operation of more than one or two such flights in any given week, nor to prescribe any specific maximum limitation upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in numbers of flights and intervals between flights and through frequent and extended definite breaks in service * * *"

Similar provisions also have been included in cease and desist orders entered as to Willis Air Service, Inc., Docket No. 2639, and Trans-Luxury Airlines, Inc., Docket No. 2589.

the New York area. The Regulation also provides that these carriers may not conduct regular service within any point; that is, as between LaGuardia Airport, Newark Airport, Floyd Bennett Field, etc.[8]

There are probably certain types of service which appear to lend themselves to noncertificated air carrier operations and yet which, due to their very nature, might tend to be conducted with a regularity in excess of that permitted by the Regulation. Such might be the case as to so-called "air tours" or "all expense tours," conducted, for example, each week end to some resort region. A person desiring to conduct such service would not be prevented by this or any other regulation, however, from applying to the Board for a certificate of public convenience and necessity under section 401 of the Act or for an appropriate exemption under section 416 of the Act.

With regard to the exemptions extended to Irregular Air Carriers by this Regulation there is a distinction made between such carriers according to the weight of the aircraft which they utilize in *air transportation*.[9] As set out in subparagraph (c) (2) greater exemptions are extended to those Irregular Air Carriers which do not utilize in air transportation any single aircraft having a gross take-off weight over 10,000 pounds, or three or more aircraft (not including those under 6,000 pounds) whose aggregate gross take-off weight exceeds 25,000 pounds.

These carriers utilizing smaller aircraft must meet only the following requirements of the

---

[8] Without disclaiming jurisdiction over sightseeing operations, the Board does not deem this provision to prohibit regular local sightseeing operations, which take off and land only at the same airport.

[9] This would not include aircraft utilized solely in connection with such other operations as flight training, private plane rentals, crop dusting, etc.

Civil Aeronautics Act: (1) Maintain certain prescribed rates of compensation, maximum hours and other working conditions for airmen (subsection 401 (1)); (2) Provide safe service, equipment and facilities (subsection 404 (a)); (3) File such reports and maintain records and accounts in such form as may be required by the Board [10] (subsections 407 (a), (d)) and to give the Board access at all times to accounts, records, documents, correspondence, etc. (subsection 407 (e)); (4) Refrain from engaging in any unfair or deceptive practices or unfair methods of competition (section 411); (5) Be subject to Board inquiry into the management of the business of the carrier (section 415). Furthermore, no officer or director of such a carrier may profit in any way from the negotiation or sale of any of the securities issued by the carrier (subsection 409 (b)).

Should one of these carriers begin using, in its air transportation, services that would result in removing it from the category of an operator of small aircraft, it is required to notify the Board immediately, and thereafter would have the additional obligations imposed on Irregular Air Carriers operating large equipment.

The requirements of the Act to which Irregular Air Carriers operating larger equipment are subjected, as set out in subparagraph (c) (1) of the Regulation, are more extensive. Particular attention is directed to the requirement of section 403 of the Act that carriers publish and file with the Board tariffs showing individual and joint rates, fares, classifications and practices in connection with their services and that such tariffs be observed. Tariff filings must conform to the requirements of Section 224.1 of the

[10] No reporting or accounting requirements had been established for these carriers by the date of this Regulation. Such requirements as are subsequently established will be distributed to all carriers registering under the regulation.

Board's Economic Regulations; however, this section provides for waiver of particular requirements on application, in the event, for example, that the peculiar characteristics of a carrier's services render it impossible for it to comply with the general requirements; section 403 also specifies persons to whom free or reduced rate transportation may be issued without violation of the Act.

In addition, these carriers utilizing large equipment are required to file quarterly operational reports to reflect the extent and character of their activities as provided in subparagraph (c) (6) of the Regulation.

With respect to such exemptions as have been granted to all Irregular Air Carriers regarding sections 408, 409 and 412 of the Act, it should be pointed out that one of the effects of Board approval of filings under these sections is to relieve the parties thereto from the operation of the so-called "antitrust" laws. By exempting the carriers to some extent from the requirement of filing under these sections, the Board has not thereby suspended the operation of the antitrust laws. There is nothing, however, to prevent a carrier desiring relief from such laws with respect to any arrangement otherwise fileable from making an appropriate filing, even though not required by this Regulation to do so. Board approval thereof, if obtained, would effect the desired relief.

As provided in paragraph (d) of the Regulation, Irregular Air Carriers, in order to enjoy the benefits of the exemptions granted, are required to register with the Board and to hold an effective Letter of Registration. For the carrier's convenience in registering, appropriate forms are attached to the Regulation.

Because Irregular Air Carriers have not heretofore been subjected to economic regulations of the extent prescribed in the revised Section 292.1, and therefore may be unfamiliar

with such regulation, it is important that all such carriers acquaint themselves to the greatest degree possible not only with all pertinent provisions of the Civil Aeronautics Act, but also with the Board's Economic Regulations issued thereunder. Accordingly, there is set out below, for information purposes only, a list of Economic Regulations, one or more of which are applicable to all Irregular Air Carriers, showing the sections of the Act under which they were promulgated. These regulations, together with copies of the Civil Aeronautics Act of 1938, as amended, are obtainable at nominal cost from the Superintendent of Documents, Government Printing Office, Washington, D. C. Regulations prescribing reporting and accounting requirements under section 407 (a) and (d) will be forthcoming in the near future.

| Section of act | Section of Econ. Reg. | Subject |
|---|---|---|
| 403 | 224.1 | Filing of Tariffs. |
| | 228.4 | Free or Reduced Rate Transportation. |
| 407 | 280.1 | Stock Ownership Reports by Officers and Directors. |
| | 280.2 | Stock Ownership Report by Air Carrier Affiliates. |
| 409 | 248.1 | Approval of Interlocking Relationship. |
| 412 | 251.1 | Filing of Intercarrier Agreements. |
| 605 | 228.3 | Access to Aircraft. |
| 1002 | 285 | Rules of Practice Before Board. |

FINDINGS

The Civil Aeronautics Board, having held a hearing and issued its opinion in the Investigation of Non-Scheduled Air Service, Docket No. 1501, relating to noncertificated air carriers,[11] having circulated for comment a draft

[11] As used herein the term "noncertificated air carriers" refers to air carriers engaging in air transportation which do not hold certificates of public convenience and necessity issued by the Board, and the term "certificated air carriers" refers to air carriers which do hold such certificates.

and thereafter a revised draft of proposed regulation relating to noncertificated air carriers, having considered written comments and oral argument thereon in Docket No. 2742, and having also considered other data and information [12] available to the Board, finds as follows:

1. Since 1938 there has been in effect an exemption regulation adopted by the Board which exempts noncertificated air carriers from all provisions of Title IV of the Civil Aeronautics Act (other than sections 401 (1) and 407 (a), and, since June 1946, section 411) so long as they engage only in irregular services as defined in such regulation. At the time such regulation was originally adopted the Board believed it was undesirable to provide for the detailed economic regulation of the operations of such carriers without further study. Since that time and particularly following the close of the war, the Board has accumulated information and data which indicate that the aggregate operations of such carriers have increased in scope and importance, and that operations by individual carriers are frequently extensive. Some such operations have been conducted with little regard to the responsibility and duty owed to the public by a common carrier with respect to service, and have resulted in numerous complaints to the Board concerning tariff and operating practices, including but not limited to failure of such carriers to perform the service agreed upon, great variations in the fares and

[12] Such data and information include, among other things, the reports heretofore filed with the Board pursuant to Section 292.1 of the Economic Regulations, data obtained in investigations made by the enforcement staff of the Board, financial Forms 41, 2380, and 2780, and other reports filed with the Board by the certificated air carriers, informal complaints filed against non-certificated air carriers, and applications for air carrier operating certificates filed with the Civil Aeronautics Administration pursuant to Part 42 of the Civil Air Regulations.

rates charged by the same carrier for comparable service, failure to make refunds to passengers and shippers for transportation not performed, misrepresentation of equipment, facilities and services, and use of inadequate and makeshift equipment and facilities. Both the protection of the public from improper practices by such noncertificated air carriers and protection of the certificated carriers against unregulated competition require that additional regulatory provisions of the Civil Aeronautics Act be now made applicable to such noncertificated air carriers.

2. In addition to the public demand and need for air-transportation services furnished by the certificated air carriers on regularly scheduled operations, there is public demand and need at the present time for air services on an irregular basis both to certificated and noncertificated points. Such irregular services vary greatly with respect to type of service, and fill a need which, because of fluctuations in the demand and the impossibility of determining where and when the demand will arise, by its very nature cannot be fulfilled economically by carriers operating on regular schedules and routes. Such services can be performed by noncertificated air carriers, and because of their knowledge of local conditions or willingness to perform specialized types of services such services can frequently be performed by them more adequately, economically and quickly than by certificated carriers. To require the certification of such carriers at the present time would be impracticable because it would be necessary to issue a certificate of public convenience and necessity which would either impose no substantial limitations upon operations or which would substantially reduce the flexibility and usefulness of the operations of such carriers. Certification, in the case of many small-scale operations, would be uneconomical and would tend to prevent or re-

tard the development of new types of services designed to meet special conditions. Because of the fact that irregular services meet a different need and must be infrequent and irregular, such services, if properly regulated under provisions of the Act other than those relating to certificates of public convenience and necessity, will not under present conditions have adverse competitive effect upon the services performed by the certificated air carriers.

3. In view of the considerations mentioned in paragraphs 1 and 2 hereof, and in order to insure the flexibility in the conduct of irregular services which is implicit in exemption of noncertificated air carriers from certification, Irregular Air Carriers, as defined in Section 292.1 below, should continue to be exempted from the requirements of section 401 of the Act other than subsection (1). Protection of the public and the orderly development of the air transportation system in accordance with the objectives of section 2 of the Act, however, require that certain provisions of the Act which are not directly related to the certification provisions of the Act should be made applicable to the Irregular Air Carriers utilizing equipment of substantial size. Such carriers are now subject to sections 401 (1), 407 (a) and 411, and these requirements should be continued. In addition, such carriers should now be made subject to sections 403, 404 (b), 407 (b), 407 (c), 407 (d), 407 (e), 409 (b), 410, 415 and 416; and to the requirements of section 404 (a) relating to safe service, equipment and facilities. In addition, such carriers should be made subject to the provisions of sections 408, 409 (a), 412, 413 and 414, except to the extent, as more fully set forth in paragraph (c) of Section 292.1 below, that such provisions involve other Irregular Air Carriers.

4. A portion of the irregular air service now being performed is performed by small air car-

riers operating a limited number of planes of small size. From reports submitted to the Board it appears that noncertificated air carriers operating one or more aircraft having a gross take-off weight in excess of 10,000 pounds constituted less than 20 percent of the total number of noncertificated air carriers, but flew approximately 90 percent of the total revenue passenger miles flown by all such carriers. It would thus appear that Irregular Air Carriers operating aircraft under 10,000 pounds may be subjected to a much lesser degree of economic regulation without materially affecting the overall air transportation system. Such operations are limited in scope, do not represent a serious threat to certificated operations, and extensive regulation thereof at this time would be unduly burdensome and costly to such carriers, would tend to increase the cost and impair the value of such services to the public, and would impose unnecessary additional administrative burden upon the Board. Accordingly, such Irregular Air Carriers should not be made subject to sections 403, 404 (b), 407 (b), 407 (c), 408, 409 (a), 410 and 412, but should be made subject to all other provisions of the Act to which the Irregular Air Carriers utilizing equipment of substantial size are subject.

In drawing the line between the Irregular Air Carriers utilizing equipment of substantial size and the Irregular Air Carriers which utilize only smaller equipment, the Board finds that the use of a single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds would involve an operation of substantial size in relation to the service offered to the public and the competitive effect upon other air carriers; and that the use of aircraft units having an allowable gross take-off weight between 6,000 and 10,000 pounds and an aggregate gross take-off weight in excess of 25,000 pounds would likewise involve a substantial operation.

5. Section 292.1 of the Economic Regulations as revised herein, unlike the exemption heretofore in effect does not provide for exemption from the Act with respect to the carriage of persons in foreign air transportation. The Board finds that notwithstanding the findings in paragraphs 2 and 3 hereof the continuation of the exemption with respect to such transportation is no longer justified in view of the recent substantial extension of our international air transportation system, as well as the recent award of foreign air carrier permits, and in view of smaller traffic potential which the Board finds to exist in the field of international air transportation as compared with interstate and overseas air transportation.

6. As a condition to the grant of the exemptions provided for in Section 292.1 below, such section will provide for letters of registration to be issued to Irregular Air Carriers, for quarterly operation reports, and for special reports on the institution of service with large aircraft by such carriers theretofore utilizing only small aircraft. These requirements are deemed necessary in order that the Board may maintain adequate supervision and obtain information with respect to exempted operations.

7. Unless specific provision were made herein the officers and directors of Irregular Air Carriers otherwise would be subject to the interlocking relationships provisions of section 409 of the Act, even though the Irregular Air Carriers in which they hold their positions are wholly or partially exempted from such provisions by the terms of Section 292.1 below. The Board's statutory powers to grant exemptions from provisions of Title IV of the Act extend only to air carriers and not to individuals or persons other than air carriers. Certain interlocking relationships as specified in section 409 occupied by such persons are lawful only if approved by the Board upon due show-

ing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby. The Board has determined in this regard that since it is granting exemption to certain Irregular Air Carriers from the requirements of section 409 with respect to certain relationships, a due showing within the meaning of the statute to justify approval of an interlocking relationship, upon application filed by an officer or director of an Irregular Air Carrier, would be made by a showing that such carrier itself had been granted an exemption from the necessity of obtaining approval. To require each such officer or director to file such an application and make such a showing, however, would appear to impose a useless administrative burden upon the Board and would not be conducive to the proper dispatch of business and to the ends of justice. The Board has determined, therefore, that such showing by all such officers and directors individually shall be presumed to have been made, and upon the basis thereof has granted blanket approval of such interlocking relationships in Section 292.1 below.

8. In view of the foregoing considerations, the present enforcement of the provisions of Title IV, except to the extent required in Section 292.1 below, would be an undue burden on Irregular Air Carriers by reason of the limited extent of, and the unusual circumstances affecting the operations of such carriers, and would not be in the public interest.

On the basis of the foregoing findings and pursuant to the Civil Aeronautics Act of 1938, as amended, particularly sections 205 (a) and 416 (b) thereof, and for the purpose of providing for the economic regulation of services conducted on an irregular basis by non-certificated air carriers, the Civil Aeronautics Board hereby amends Section 292.1 of the Economic Regulations in its entirety to read as follows effective June 10, 1947:

U. S. GOVERNMENT PRINTING OFFICE: 1948